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No. 1299

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In the Supreme Court
of the United States

OCTOBER TERM, 1969

In re Complaint as to the Conduct

of

PHILIP WEINSTEIN, Accused,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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In re Complaint as to the Conduct

of

PHILIP WEINSTEIN, Accused,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on October 15, 1969, with a denial of petition for rehearing on November 12, 1969. Petitioner was given until March 12, 1970 to file this petition by letter of January 30, 1970.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is printed in Appendix B hereto, infra, 16, and is reported in 89 Adv. Sh. 409, — Or. —, 459 P.2d 548.

JURIDSICTION

The judgment of the Supreme Court of the State of Oregon was dated and filed October 15, 1969. Rehearing was denied on November 12, 1969 (89 Or. Adv. Sh. No. 8, dated November 26, 1969; R. 693). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

May lawyers in disbarment trials be denied the protection of the Fourteenth Amendment to the Constitution of the United States?

The Oregon Supreme Court says Yes—Lawyers may be denied a speedy trial because "bar disciplinary proceedings are not criminal prosecutions" (App. B, 17).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the Constitution of the United States (App. A, 15).

STATEMENT OF THE CASE

1. Procedural History and Federal Question Presented.

This was an original proceeding before the Supreme Court of Oregon for disbarment of petitioner. It was tried to a Bar trial committee.

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The charges which are the subject of this disciplinary proceeding were docketed with the Oregon State Bar in December, 1958 (R. 227); petitioner was first served with a complaint in November, 1960 (R. 1). The trial on the charges was not commenced until seven years later in October, 1967 before a trial committee of the Oregon State Bar (Tr. 1).

Petitioner filed with the Bar a timely Demand for Dismissal before trial based upon the denial of his right to a speedy trial on the charges against him under the Sixth and Fourteenth Amendments to the United States Constitution. In this demand he fully and carefully set out how he had been severely prejudiced by the delay (App. E, 30). The Demand for Dismissal was denied by the trial committee (Tr. 52, 53). It thereafter proceeded with the trial. Petitioner was found guilty by the trial committee of certain charges and permanent disbarment was recommended by the Board of Governors (App. B, 16).

The Demand for Dismissal was renewed in the Supreme Court of Oregon, App. F, 38) but was denied in the opinion of the court filed October 15, 1969 (App. B, 16). Petitioner was disbarred permanently (App. B, 18).

A Petition for Rehearing was filed by petitioner on November 3, 1969, reasserting his demand that the proceedings be dismissed on the ground that he had been denied his constitutional rights to a speedy trial. On November 12, 1969, the Oregon Supreme Court denied petitioner's petition for rehearing without

opinion (89 Or. Adv. Sh. No. 8, dated November 26, 1969; R 693).

2. Facts Material to the Question Presented.

Disbarment charges were docketed with the Oregon State Bar December, 1958 (R. 227). In November, 1960 a disbarment complaint was filed and served on Weinstein (R. 1).

The disbarment case was not tried until October, 1967—seven years later (Tr. 1). This unseemly delay is the basis of this petition. The seven years can be divided into three periods.

FIRST PERIOD—(November, 1960-April, 1962).

January, 1961, two months after disbarment charges were filed, Weinstein was indicted in the United States District Court for mail fraud, unlawful use of police radio and conspiracy (R. 102, 111).

Shortly thereafter, the Bar filed a second amended complaint charging Weinstein additionally with much of the same conduct as set out in the indictment (R. 65).

The Bar then tried to coerce Weinstein's deposition (R. 36-48). It subpoenaed him for deposition, requiring, among many other things, that he "testify under oath concerning the knowledge and information you possess concerning * * * each of the indictments pending against you in the District Court of the United States for the District of Oregon * * *." (R. 84, 85.)

Weinstein refused to give his deposition; whereupon the Bar petitioned to disbar him on that ground alone (R. 151, 159). This maneuver failed to coerce his deposition. Whereupon, the Bar set the disbarment trial for July, 1961 (R. 182, 189).

Weinstein vainly implored the Bar to delay the disbarment trial until after the criminal trials (R. 86, 95, 176, 177, 183, 190). The Bar flatly refused any delay (R. 188; Ex. 3, letter dated July 3, 1961).

Weinstein had no alternative. He brought a proceeding in United States District Court to enjoin the Bar. Just one week before the disbarment trial was to commence, the Bar was temporarily enjoined from proceeding with the trial (App. B, 20). Later a three-judge federal district court enjoined the Bar from trying disbarment proceedings until both of the federal court cases were tried. (The opinion of the court printed in App. D, 22).

The Bar was baying at Weinstein's heels, closing in for the kill. It was so intent upon forcing Weinstein to trial in July, 1961 that it could only be deterred by injunction.

Petitioner was tried and convicted in federal court on three counts of mail fraud and one count of conspiracy (R. 249). Upon sentencing February 7, 1962, he was suspended from law practice by the Oregon Supreme Court pending his appeal (Letter of February 9, 1962, Oregon State Bar to Oregon Supreme Court, Ex. 3).

The federal injunction against the Bar was lifted April, 1962 upon dismissal of the remaining indictment (Ex. 3). Thereafter, the Bar was free to try the case anytime at will.

SECOND PERIOD—(April, 1962-October, 1964). Weinstein requested that the disbarment trial be held in abeyance until the criminal appeal was decided by the Ninth Circuit Court of Appeals (R. 221, denied R. 227; R. 265, R. 269). From May, 1962 until October, 1964 the Bar kept talking and maneuvering to try the case, but never did get around to it (Ex. 3). During this period the Bar filed a third and a fourth amended complaint (R. 195, 228).

October, 1964 the Ninth Circuit Court of Appeals reversed the entire criminal conviction (Opinion Ex. 147, Tr. 2622). This was now approximately six years since the disbarment matter had been docketed by the Bar in 1958, and nearly four years since charges had been served.

THIRD PERIOD—(October, 1964-October, 1967).

The Ninth Circuit Court of Appeals later withdrew its October, 1964 opinion. In February, 1965 it again reversed all the charges on Weinstein's criminal conviction [*Barnard* v. *United States*, (C.A. 9) 342 F.2d 309].

Not until three years after the Ninth Circuit Court of Appeals opinion of October, 1964 was the disbarment tried: October, 1967. This was not a 27-month hiatus as per the Oregon Supreme Court, or

as the Bar concedes (App. B, 17). It was 36 months —plus the four years from 1960 to 1964.

December, 1964 the Bar stated it was going to file a fifth amended complaint (Ex. 3). In September, 1966, 21 months later, the Bar filed the fifth amended complaint (R. 355).

Nine months later, May, 1967, the Bar filed a sixth amended complaint (R. 380). The case was brought to trial October, 1967 on this complaint (Tr. 1).

The sixth amended complaint charges Weinstein with 25 counts. The 25th count recapitulates the first 24. In the first 24 counts, the years involved are as follows:

1956—Three Counts
1957—One Count
1958—Nine Counts
1959—Four Counts
1960—Five Counts
1961—One Count
1962—One Count (R. 380)

The 1962 count, the most recent, was dismissed by the Bar because of the unavailability of witnesses (Tr. dated 10-13-67, pp. 32, 33). Consequently, there was not one count less than six years in age: 17 counts out of 23 were from the 1950 decade.

REASONS FOR GRANTING THE WRIT

Weinstein was denied his constitutional right to a speedy trial. From docketing to disbarment trial was nearly nine years (1958-1967). From complaint to trial was seven years (1960-1967). It was five and a half years from the time the injunction was lifted until he was tried (1962-1967). It was three years from the time the Ninth Circuit Court of Appeals published its first opinion until the matter was tried (1964-1967).

Obviously, it is important to petitioner that his right to practice law be protected by the Fourteenth Amendment. But this importance is not confined to petitioner. The decision of the Oregon Supreme Court threatens the independence of *every lawyer in the United States.* The decision plainly says that lawyers have fewer constitutional rights than other people and professions. If allowed to stand, this decision will render the legal "profession largely incapable of performing the very kinds of services for the public that most justify its existence." (Justice Black's dissent, *Cohen* v. *Hurley,* 366 U.S. 117, 135). It serves fair notice to all lawyers that if they get into trouble of any kind, that Bar discipline will be rendered on a basis where little or no protection can be expected from the Fourteenth Amendment.

The Oregon Supreme Court justifies this by simply saying that "bar disciplinary proceedings are not criminal prosecutions," and therefore a lawyer has no

protection from the Fourteenth Amendment (App. B, 17, 18). By such classification the Oregon Supreme Court enables itself to skirt and ignore decisions such as *Spevack* v. *Klein*, 385 U.S. 511, and *In Re Ruffalo*, 390 U.S. 544.

The Oregon Supreme Court attempts to gloss over the "dilatory" conduct of the Bar by reference to "volunteers functioning in the disciplinary sector" and the necessity for the "protection of the public" against lawyers (App. B, 17).

Yet it was these very same harried volunteers that literally bulldozed this case to the very brink of trial in July, 1961 over all objections of Weinstein. So wrongfully insistent on trial in 1961 were these Bar volunteers that Weinstein had no alternative than to seek and obtain a federal court injunction against the Oregon State Bar, its Board of Governors, its secretary, its trial committee, and its prosecutors (App. C and D, 20, 22). This injunction stopped the disbarment trial only one week before it was scheduled to start.

Whatever may have been the motive of these volunteers in forcing Weinstein to disbarment trial in 1961 prior to the trial of the federal court cases, the Bar is now in no position to plead that it was not dilatory and could not get the matter to trial until late 1967—over six years later. It could have tried the case at any time after the injunction was lifted—April, 1962.

As for these "volunteers," the Oregon State Bar had the active help and cooperation of the United States Attorney, the FBI, the Postal Inspectors, the Multnomah County Sheriff's office, and the Portland Police Department. It had a lieutenant in the sheriff's office and a paid Bar employee working full-time for many months. It hired a professional investigator (Tr. 2695). [See *Barnard* v. *United States*, (C.A. 9) 342 F.2d 309, 315; Tr. 1364, 1876, 1392.] At trial it had five full-time prosecutors (Tr. 54). It ran up a cost bill for Weinstein of $9,706.37 (App. B, 19). Against all this Weinstein had his one attorney who has attempted to defend him for 10 years now since 1960.

The Oregon Supreme Court says there was "a delay of nearly five years which had been requested by [Weinstein] while related litigation was pending in the federal courts." (App. B, 17). —This is not true. Weinstein obtained the injunction July, 1961. It was lifted April, 1962. From April, 1962 until October, 1964 (Ninth Circuit Court of Appeals' first opinion) Weinstein suggested and requested that the disbarment not be tried—a period of about two and a half years. The Bar was content because Weinstein was under suspension (*In Re Weinstein*, 240 Or. 555, 402 P.2d 751). The very strong and critical opinion of the Ninth Circuit Court of Appeals of October, 1964 (Ex. 147) made it clear to everyone that if Weinstein was to be disbarred, it would have to be done by the Bar.

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The next three years of delay (October, 1964-October, 1967) was particularly inexcusable. How can the apologetic Oregon Supreme Court say there was no "vexatious and unreasonable delay on the part of the Bar" (App. B, 1)? The bar tried to force the case to trial in 1961. Since it was prepared to try the case in 1961, why could it not try it in 1964, 1965 or 1966? Why the delay until October, 1967?

Weinstein was entitled to a speedy trial:

Klopfer v. *North Carolina*, 386 U.S. 213 (1967), holds the Sixth Amendment's guarantee of a speedy trial is applicable to the states through the due process clause of the Fourteenth Amendment.

Spevack v. *Klein*, 385 U.S. 511, 516 (1967), extends to lawyers the Fifth Amendment privilege against self-incrimination.

In Re Ruffalo, 390 U.S. 544, 551 (1968), holds that disbarment cases are adversary proceedings of a quasi-criminal nature, and that attorneys are entitled to the safeguards of due process as guaranteed by the Sixth and Fourteenth Amendments.

The foregoing cases were cited to the Oregon Supreme Court by Weinstein. It dismissed them summarily without mentioning them by name as "inapposite in this case"—"bar disciplinary proceedings are not criminal prosecutions" (App. B, 17). The real reason the Oregon Supreme Court did not mention these cases is because it is impossible to distinguish them, so it ignored them. For its only authority it

cited one of its own decisions. Thus, a man faced with permanent loss of his license to practice law has none of the benefits of the Fourteenth Amendment, says the Oregon Supreme Court. Why? Because a disbarment proceeding is not a criminal prosecution.

Weinstein has been sentenced to permanent disbarment—a penalty of terrible consequences. Nevertheless, the Oregon Supreme Court holds he was not entitled to the protection of the Fourteenth Amendment. Weinstein was charged with serious offenses by the Bar; included were: violations of 47 U.S.C. 501 and 605; 18 U.S.C. 1341; and Oregon Revised Statute 9.460(7).

This Court has held that even forfeiture proceedings are criminal in nature for Fourteenth Amendment purposes, as applied to the state courts. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965). The loss of a license to practice one's profession is hardly comparable to the loss of a Plymouth automobile—or some plate glass (see *Boyd* v. *United States*, 116 U.S. 616 (1885).

The Oregon Supreme Court holds that charges can be left dangling over a lawyer indefinitely. That is exactly what this Court condemned in *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). It is the general type of conduct the Ninth Circuit Court of Appeals condemned the government for with a witness when it reversed Weinstein's conviction (342 F.2d at 317); conduct of the government that "shocked" the Circuit Court of Appeals (342 F.2d at 319, 320).

The Oregon Supreme Court would forfeit a lawyer's constitutional rights because of a paramount public interest in disciplining him (App. B, 17, 18). This argument can be made in relation to *any* crime; adherence would soon decimate all constitutional rights to the level of zero. The Oregon Supreme Court says lawyers are fair game with few or no rights—that *Spevack* v. *Klein*, 385 U.S. 511, 516 (1967), is "inapposite"; "lawyers [do not] enjoy first-class citizenship" in Oregon. This is the surest way to kill independent, strong and fearless lawyers. It will eventually lead to a sniveling, groveling, foot-licking bar; lawyers afraid to stand up for their clients or to espouse any unpopular cause. Petitioner was denied his constitutional rights to a speedy trial. If he can be denied his constitutional rights because he is a lawyer, other cases will follow with devastating effects to clients everywhere, and to the general public.

The Oregon Supreme Court shortsightedly denies constitutional protections to lawyers supposedly for the "protection of the public" (App. B, 17, 18). It will be the public that is harmed by this grossly discriminatory decision. Second class citizens cannot function with vigor as first class protectors of the rights and liberties of the public.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

U. S. Constitution

AMENDMENT VI

Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. Citizenship; Privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Opinion of Oregon Supreme Court

PER CURIAM.

The Board of Governors of the Oregon State Bar has recommended to this court the permanent disbarment of Philip Weinstein upon findings by a trial committee that he was guilty of unprofessional conduct.

The accused challenges the findings and recommendation on two grounds: insufficient evidence of guilt, and unreasonable delay upon the part of the Bar in proceeding with the prosecution of his case after filing charges against him.

Of the twenty-five specifications of misconduct charged by the Bar, the trial committee found the accused guilty of seventeen, not guilty of seven, and dismissed one. The Board of Governors, in reviewing the trial committee's findings, concurred in the findings of guilt with reference to fifteen specifications of misconduct. The specifications for which guilt was established included the employment of runners to solicit law business and other professional misconduct sufficient to warrant disbarment. Criminal conduct which was also charged was not proved.

We have examined the record, and find that the specifications of misconduct of which the accused was found guilty by the trial committee and which have been concurred in by the Board of Governors were

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amply supported by evidence. No useful purpose would be served by setting forth the details of the various charges and findings in these reports. For a related case involving most of the same witnesses and similar charges of misconduct, see In re Herbert D. Black, 228 Or. 9, 363 P.2d 206 (1961), and — Or. —, 444 P.2d 929 (1968).

With reference to the asserted defense of unreasonable delay, bar disciplinary proceedings are not criminal prosecutions, and analogies drawn from cases in the criminal courts are inapposite in this case. See, e.g., In re Paul F. Gronnert, 242 Or. 233, 391 P.2d 772 (1964). The Bar concedes that its counsel allowed some twenty-seven months to elapse while pressing charges that undoubtedly could have been carried to trial in a shorter time. If this course of action on the part of the various volunteers functioning in the disciplinary sector of the Bar's responsibilities was dilatory, however, it followed a delay of nearly five years which had been requested by the accused while related litigation was pending in the federal courts. See Barnard v. United States, 342 F.2d 309 (9th Cir.), cert. denied, 382 U.S. 948, 86 S. Ct. 403, 15 L. Ed. 2d 356 (1965).

It is unnecessary to define in this case the proper remedy for vexatious and unreasonable delay on the part of the Bar. None has been shown in this case. It ought to be made clear, however, that the primary purpose of professional disciplinary proceedings is to protect the public. The punishment of an offending

member of the profession is indeed a serious matter, but it is incidental to the protection of the public. If the conduct of a member of the Bar disqualifies him from the practice of law, it would not be in the public interest to dismiss the disciplinary proceedings for no reason other than the Bar's failure to prosecute them with the proper dispatch.

The accused is permanently disbarred, and the Bar is awarded judgment for its costs and disbursements.

Judgment of Oregon Supreme Court

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 6th day of OCTOBER 1969, WHEREUPON on this WEDNESDAY, the 15th day of OCTOBER 1969, the same being the 7th judicial day of said term, when the following proceedings were had:

In re: Complaint as to the Conduct of)
) DISCIPLINARY
PHILIP WEINSTEIN,) PROCEEDING
Petitioner)

This proceeding having been duly heard before a trial committee appointed by the Board of Governors of the Oregon State Bar upon complaint as to the professional conduct of Philip Weinstein, a duly licensed attorney of this court, and the trial committee

having made its report and findings to said board, and thereafter said board having filed in this court the record of all proceedings, together with its findings and recommendations,

And on September 8, 1969, this cause having been duly argued and submitted upon and concerning all questions arising upon said record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their arguments and briefs adopts the recommendation of the Board of Governors.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that PHILIP WEINSTEIN be and he hereby is permanently disbarred from the practice of law in the state of Oregon.

IT FURTHER IS ORDERED that the Oregon State Bar have and recover of and from the accused its costs and disbursements incurred herein and taxed at $9,706.34.

APPENDIX C

Temporary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PHILIP WEINSTEIN, *Plaintiff,*	)	
v.	)	No. C 61-306
DEAN F. BRYSON, et al, *Defendants.*	)	ORDER

On July 24, 1961, there came on regularly for hearing before the undersigned Judge of the above-entitled Court, plaintiff's motion for an order to show cause why his complaint for injunctive relief heretofore filed should not be granted; plaintiff appeared in person and by his attorney, Dwight L. Schwab, the defendant Oregon State Bar appeared by its attorneys George W. Mead and Carrell F. Bradley, and all of the individually named defendants appeared through their attorney, Roy F. Shields.

The defendants having filed a motion to dismiss and also a request for a three-Judge court to hear and determine such motion and plaintiff's application for injunction, and it appearing to the court that such request for a three-Judge court should be granted;

IT IS THEREFORE ORDERED that a three-Judge court be constituted as provided in Title 28,

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Sections 2281 and 2284 of the U. S. Code to hear and determine such matters; and

It is further ORDERED that the defendants, and each of them, pending the hearing and determination of said matters by such three-Judge court are restrained and enjoined from any further proceeding in connection with the disciplinary proceedings against plaintiff by the Oregon State Bar.

DATED at Portland, Oregon, this 24th day of July, 1961.

CHARLES L. POWELL
District Judge

APPENDIX D

Opinion Granting Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 61-306

PHILIP WEINSTEIN,

Plaintiff,

vs.

DEAN F. BRYSON, RAY H. LAFKY, HAROLD BANTA, CHARLES G. HOWARD, ROBERT C. ANDERSON, J. T. MONAHAN, WILLIAM M. DALE, JR., G. W. KELLINGTON, EUGENE E. MARSH, OWEN M. PANNER, ROBERT T. MAUTZ, HARRY A. SLACK, ROBERT A. LEEDY, ORVAL D. YOKUM, HARVEY S. BENSON, GEORGE W. MEAD, CARRELL F. BRADLEY, JOHN H. HOLLOWAY and OREGON STATE BAR,

Defendants.

Before POPE, Circuit Judge, MURRAY and POWELL, District Judges.

PER CURIAM.

Plaintiff, an attorney at law, and an active member of the defendant Oregon State Bar, brought this action against the Bar and the other named defendants who are members of the Board of Governors, and the Secretary of the Oregon State Bar. He seeks a decree enjoining and restraining the defendants from prosecuting certain disbarment proceedings

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against him until after trial of two criminal cases pending in the District Court of the United States for the District of Oregon wherein he and others have been indicted for certain alleged acts. These acts are identical with some of the acts charged against plaintiff in the disbarment proceedings and for the commission of which his disbarment is sought. Since the action sought injunction restraining the enforcement of state statutes by restraining the action of state officers in the enforcement and execution thereof, defendants requested hearing by a district court of three judges and such court was accordingly constituted.

Upon the institution of the action a temporary restraining order was issued pending the time when the members of the three-judge court could assemble and hear the cause further. Since that time one of the two indictments mentioned has been tried and a verdict of guilty has been returned therein against the plaintiff in this action. The criminal case in which such verdict has been returned awaits judgment pending the hearing of post-conviction motions including a motion for a new trial.

This court takes judicial notice of all that has transpired in said criminal case since the institution of this action. Because of our knowledge of those proceedings and because all of the facts herein have been admitted either by admission of certain allegations of the complaint or by stipulation in open court at the time this cause was called for final hearing upon the

merits, the case presents no question of fact for our determination; and we are called upon merely to arrive at an appropriate conclusion in the light of the admitted facts.

On November 2, 1960, the Oregon State Bar, herein called The Bar, filed a complaint against the plaintiff before the Board of Governors, seeking plaintiff's disbarment. Service of the complaint and notice to answer was made on plaintiff on November 14, 1960. The grounds for such original complaint are not disclosed in this action and they are not material here except that it is admitted that they are grounds other than those brought forward and included in a second amended complaint based upon the allegations in said indictments. Subsequently on motion of the plaintiff he was allowed a bill of particulars of the charges in said original complaint.

On January 23, 1961, plaintiff was arrested on the indictments in two cases in the said district court, said two cases being No. C-19098 and C-19100. The first of said indictments charged the plaintiff and others in several counts with devising and intending to devise schemes and artifices to defraud and to obtain money and property by false and fraudulent representations and executing the same through the use of the Post Office establishment of the United States in violation of § 1341 of Title 18 U.S.C. Also included in the indictment was a count charging plaintiff and others with conspiracy to commit violations of said § 1341. The second of said indictments

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charged the plaintiff and others in several counts with interception of radio communications made and transmitted by the Portland police, in violation of § 501 and § 605 of Title 47 of the United States Code, and with conspiracy to commit such offenses.

The Bar, on March 17, 1961, served and filed an amended complaint in said disbarment proceedings called "Second Amended Complaint," which embodies all of the elements contained in the federal court indictments above referred to. Following the filing of this amended complaint, plaintiff unsuccessfully sought to obtain a bill of particulars of said amended complaint and a portion of the present complaint is based upon plaintiff's contention that the denial of such bill of particulars to him in the circumstances of this case amounted to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

In this connection plaintiff attacks as void and unconstitutional for the same reasons § 24 of the Rules of Procedure relative to disbarment under the Oregon State Bar Act which provides that demurrers and motions shall not be allowed in such proceedings.[1] Upon the trial this court ruled that it would not pass upon those allegations of the complaint which attacked the procedure and rules of pleading upon disbarment

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[1] "§ 24. Pleadings. The pleadings permissible in proceedings before the trial committee are the complaint and amended complaint (if any); the answer or amended answer (if any) to the complaint. Demurrers and motions shall not be allowed."

proceedings of the character of those here involved for the reason and upon the ground that this court as a federal court ought to abstain from an adjudication as to such matters under the rule set forth in Alabama Public Comm'n v. Southern R. Co., 341 U.S. 341, and Harrison v. N.A.A.C.P., 360 U.S. 167. Accordingly the court rejected offers of evidence in support of the plaintiff's claim with respect to denial of his demand of a bill of particulars and with respect to his claim as to the invalidity of said § 24.

At the time this suit was instituted and prior to plaintiff's trial upon the first of said indictments, plaintiff's main complaint was to the effect that to compel his trial in the disbarment proceedings prior to the trial of the indictment, would operate effectively to destroy and nullify plaintiff's constitutional right not to be a witness against himself and his immunity from any requirement to take the stand or to give testimony upon the trial of said indictments. His claim of jurisdiction is based in part upon the provisions of Title 42, § 1983 U.S.C. as follows: "Every person who, under color of any statute, . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Plaintiff also asserts that the trial or the prosecu-

tion of the disbarment proceedings prior to the trial of the indictments, would operate to deny him due process of law in that he would be placed in a situation where he would either have to give testimony which could be used against him in the criminal prosecution as fully as if his deposition had been taken or if he refused to testify he could be disbarred for that reason alone under the rule recognized in Cohen v. Hurley, 366 U.S. 117. These same objections, urged in the proceeding before the Bar, were rejected.

Our jurisdiction would appear to be based upon Title 28, § 1343. See Hague v. C.I.O., 307 U.S. 496.

On behalf of the defendants it is urged that they are judicial officers of the state and hence have the same immunity from actions based upon the civil rights acts as would be accorded a judge of a court citing Peckham v. Scanlon, 7 Cir., 241 F.2d 761. In this connection they refer to § 9.550 of Chap. 9, Title I, Oregon Revised Statutes, a portion of the Oregon State Bar Act, which provides that: "The officers of the state bar, the members of its investigating, grievance and trial committees, and its investigators and attorneys acting as prosecutors or counsel, have the same privileges and immunities from civil and criminal proceedings arising by reason of their acts as such, as prosecuting and judicial officers of this state."

Disciplinary proceedings of the kind here involved are under the provisions of the State Bar Act something less than an adversary proceeding resulting in

a judgment of disbarment. Under § 9.540 of that Act the Board's function is primarily to make a recommendation to the Supreme Court of the State. See In Re Black, (Ore.) 363 P.2d 206. It must be conceded that the point thus made by the defendants raises a substantial question as to the rights of the plaintiff to rely upon § 1983, supra, as against these defendants; but we have determined to resolve that question in favor of the plaintiff.[2]

It is conceded, however, that a substantial portion of this case has become moot. Counsel for plaintiff admitted at the hearing before us that if only the first indictment had been brought against the plaintiff, the present case would now be moot for the reason that the charges upon that indictment have now been tried and upon that trial plaintiff took the stand, testified and submitted himself to cross-examination.[3] Therefore no further reason exists why the defendants should not now be at liberty to prosecute against the plaintiff any disbarment proceeding insofar as the same is based or predicated upon the acts alleged in the indictment which has thus been tried.

With respect to the second indictment, we note that the acts and things there charged against the

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[2] Thus we have no occasion to inquire whether a state enactment such as § 9.550, supra, can limit the reach of the civil rights acts.

[3] It is to be noted that if judgment be entered upon the verdict of guilty in said cause No. C-19098, then under the provisions of § 9.480 of the State Bar Act, plaintiff could be suspended summarily because of his conviction of a felony involving moral turpitude.

plaintiff are wholly different from and unrelated to the acts and things charged in the first indictment. It is our conclusion and we hold that since plaintiff retains the right not to become a witness at the trial of the case instituted through said second indictment, and since his immunity from any requirement to take the stand in said case might cause him irreparable damage in his defense of that case, the defendants should be enjoined from having any hearing in disbarment proceedings against the plaintiff based upon any matter or circumstance connected with or related to the matters alleged in the indictment in No. C-19100, United States District Court, Oregon, and from so prosecuting any disbarment proceeding in any manner which could or might require plaintiff to testify therein with respect to the matters so alleged in said indictment, until after trial and judgment in said cause No. C-19100.

All other restraints contained in the restraining order of July 24, 1961, are hereby discharged and held no longer effective.

This opinion shall constitute the findings of fact and conclusions of law herein.

Decree will be entered accordingly.

WALTER L. POPE
United States Circuit Judge
W. D. MURRAY
CHARLES L. POWELL
United States District Judges

APPENDIX E

Demand for Dismissal

Comes now PHILIP WEINSTEIN, Accused, and demands that the Board of Governors and Trial Committee dismiss all charges pending against him herein, on the ground and for the reason that the accused has been and will be denied his right to a speedy trial, due process and fundamental fairness as guaranteed by Article I, Sec. 10, of the Constitution of Oregon, the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, and the Civil Rights Act, 42 U.S.C.A., Chapter 21. Attached hereto and made a part of this demand is the affidavit of the accused.

DWIGHT L. SCHWAB
Of Counsel for the Accused
Philip Weinstein

In support of this demand the accused relies upon the attached Memorandum in Support of Demand for Dismissal.

BEFORE THE BOARD OF GOVERNORS
OF THE OREGON STATE BAR

In Re:	)	No. 699
Complaint as to the Conduct of	)	Affidavit of
PHILIP WEINSTEIN, Accused	)	PHILIP WEINSTEIN

STATE OF OREGON)
)ss.
County of Multnomah)

BLEED THROUGH POOR COPY

I, PHILIP WEINSTEIN, being first duly sworn, depose and say:

The above-entitled matter was docketed with the Oregon State Bar in January, 1959, nearly nine years ago. I was originally served with disbarment complaint herein in November, 1960—nearly seven years ago.

In January, 1961, I was indicted in the United States District Court for the District of Oregon for conspiracy, mail fraud, and using information gained from public radio (Cases No. C-19098 and No. C-19100), along with a number of other defendants. The trial for mail fraud and conspiracy (fraudulent collision claims) commenced September 12, 1961, and lasted until November 10, 1961. The trial resulted in my conviction on four counts. I was sentenced in February, 1962, to eight years in the penitentiary, together with a fine.

Shortly after my indictment in federal court as indicated above, the Bar filed an amended complaint in this proceeding which incorporated the charges against me in the indictments. Thereafter, the Bar attempted to force my deposition in this disbarment proceeding, and later attempted to set the disbarment proceeding for trial prior to the trial of the federal criminal cases. This was shortly after the decision of the United States Supreme Court in the case of *Cohen* v. *Hurley*, 366 U.S. 117, which held that a lawyer who refused to testify in a disciplinary proceeding could be disbarred on that ground itself. By reason

of my refusal to give a deposition, the Bar attempted to disbar me for that reason also.

By setting the disbarment proceeding for trial prior to the trial on the federal court indictments, the Bar placed me in an impossible position. It was the usual procedure for counsel for the Bar in disbarment proceedings to call the accused as the first witness. Undoubtedly, this was the tactic to be employed with me. Had I testified, (and in the light of the *Hurley* case, I could not have refused), the testimony would undoubtedly be used by the United States Attorney in the federal court trials. Thus, it would have been the same as if the United States Attorney had the opportunity to take my deposition. The Bar and the United States Attorney have always worked closely together in my case. Investigators for the Bar and government investigators have consistently worked together. Furnishing the Bar information was the same as furnishing it to the United States Attorney.

Consequently, I was forced to petition the District Court of the United States for the District Court of Oregon to enjoin the Oregon State Bar from forcing the disbarment case to trial prior to the trial of the criminal cases (*Weinstein* v. *Oregon State Bar*, Case No. 61-306). The federal court enjoined the Oregon State Bar as per my petition, and to guarantee my rights pursuant to the Fifth Amendment.

The injunction was lifted in April, 1962, after all federal charges had been tried or dismissed.

BLEED THROUGH POOR COPY

Upon my being sentenced in federal court in February, 1962, I immediately appealed to the Ninth Circuit Court of Appeals. Pending the appeal, the Bar held the disbarment proceedings in suspension on the theory that if the conviction was upheld, I would be automatically disbarred. If the conviction was reversed, the disbarment proceeding could be tried thereafter. This was mutually satisfactory to the Bar and to me.

In October, 1964, the Ninth Circuit Court of Appeals issued an opinion reversing my conviction and dismissing all charges as to me. Thereafter, the opinion was redrawn. In February, 1965, the Court of Appeals reversed the conviction entirely, and remanded the matter to the District Court (342 F.2d 309).

I was suspended from the practice of law from the time of my sentencing in February, 1962, in federal court until June, 1965, when my right to practice was restored by the Oregon Supreme Court over the objection of the Bar (240 Or. 555).

The Bar has known since October, 1964, that the Court of Appeals was reversing my conviction in federal court. Except when the trial of this cause was set for early September, 1967, in which month my attorney, Dwight L. Schwab, had 13 cases to try in Circuit Court which had been previously set, which required a continuance, I have not attempted in any way to delay the trial of my disbarment proceeding. It has now been set by the Bar for October 16, 1967.

The Sixth Amended Complaint charges me with 25 causes of complaint. The 25th cause recapitulates the first 24. In the first 24 counts, my conduct is referred to in the following years: 1956—3 counts; 1957—1 count; 1958—9 counts; 1959—4 counts; 1960—5 counts; 1961—1 count; 1962—1 count.

I know of no possible justifiable reason for the delay on the part of the Bar in getting this matter to trial since the Bar knew that my conviction in federal court would be reversed three years ago this month. This delay is highly prejudicial to me in defending myself. Witnesses are gone that would have been available to me several years ago. Other defense witnesses' memories have been dimmed or obliterated by the passage of time. My resources are severely limited, particularly with what I have been through since 1960.

Furthermore, the three years' delay since my case was reversed by the Circuit Court of Appeals must be considered in the light of the previous delay in this case. Three years' delay in itself is burdensome enough, but when it has been preceded by six years' delay since charges were docketed and the Bar decided to act against me, the effect of such further delay is compounded in the extreme.

The Bar must admit that the effect of this delay is all that I claim—that it is impossible to present an adequate defense due to loss of evidence, resulting from the natural effects of passing time. In fact, it has been stipulated by counsel for the Bar (hearing

October 13, 1967, before Trial Committee concerning production of documents) that they will introduce no evidence in support of Count 22 against me, the most recent charge, involving alleged conduct in 1962. The reason given by counsel for the Bar is that during the intervening years its key witness has died.

While the Bar will thus claim that it has similar difficulties, all of the delay since October of 1964 is solely the fault of the Bar, and it does not have the same difficulties which I have. For one thing, the Bar has a paid investigation staff and there are more than three prosecutors working on the case. I have only my attorney and no investigators. Furthermore, all of the material which the federal government had collected by way of information, affidavits, investigation, etc. by the Postal Inspectors, the Federal Bureau of Investigation, the Portland Police Department, the Multnomah County Sheriff's office, and other investigative agencies has been turned over to the Bar by the United States Attorney. The Postal Inspectors had worked on this case for several years prior to my indictment. The FBI had numerous agents rounding up witnesses and evidence.

The Bar and the United States Attorney have always worked hand in hand in connection with the attempts to convict me in federal court and to disbar me. As a result, the Bar is in a situation where the delay is of relatively little consequence to it. It puts me at a very unequal disadvantage. If the Bar had been diligent in this matter, it could easily have

brought the matter to trial within three months after my conviction was reversed in the Circuit Court of Appeals. The Bar's failure to do so has resulted in irreparable damage to me in connection with the trial.

Not only that, it has caused a change of position on my part. I was prepared for, and fully expected, a trial of the disbarment proceeding after my conviction was reversed. With the tolling of the months and the years thereafter, I allowed information which had been gathered to be lost; I did not attempt to keep in contact with witnesses; I attempted to make plans of my own on the assumption that the disbarment proceeding was not going to be pressed. There appeared to be a complete lack of interest in proceeding on the part of the Bar.

I urgently urge that these proceedings be dropped. Failure to do so will deprive me of my basic constitution rights guaranteed by the state and federal Constitutions, and is contrary to all concepts of fairness and justice. To force trial of the disbarment proceeding at this time will deprive me of procedural and substantive due process of law pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and will deprive me of the equal protection of the laws pursuant to the Fourteenth Amendment to the Constitution of the United States, and I will be deprived of my right to a speedy trial guaranteed by the state and federal Constitutions. I will also be deprived of my civil rights as guaranteed and protected by 42 U.S.C.A. Chapter 21.

PHILIP WEINSTEIN

Subscribed and sworn to before me this 14th day of October, 1967.

DOROTHY C. PEDERSEN
Notary Public for Oregon

(SEAL)

My commission expires: 3-17-68

APPENDIX F

Excerpt from Petitioner's Abstract of Record and Brief, Page 38, Filed with Oregon Supreme Court

THE DEMAND FOR DISMISSAL—DELAY IN THE PROCEEDINGS

The issue raised by the Demand for Dismissal filed by the Accused is the most important in this case. Are lawyers in disbarment proceedings, who are threatened by the loss of their professional reputation and livelihood, entitled to the rights of first-class citizenship guaranteed by the Constitution of the United States and the State of Oregon?

Shortly before this case was finally scheduled to be tried, Weinstein filed with the Bar a Demand for Dismissal (Ab. 24) based on the ground that he had been denied his right to a speedy trial, due process and fundamental fairness as guaranteed by Article I, Section 10, of the Constitution of the State of Oregon, the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and the Civil Rights Act, 42 U.S.C. Chapter 21. *Weinstein hereby again reasserts this demand* (Emphasis added).